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In The
Supreme Court of the United States

OCTOBER TERM 1970

NO. 571

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Petitioner,

-vs-

IRIS HODGE, as Administratrix of the
Estate of James L. Hodge, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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In The
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JACKSONVILLE TERMINAL COMPANY, a corporation,

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IRIS HODGE, as Administratrix of the Estate of James L. Hodge, deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Jacksonville Terminal Company, a corporation, brings this its Petition for Writ of Certiorari and represents and shows as follows:

1. The opinions of the Courts sought to be reviewed are reported, officially and unofficially, as follows:

(a) Iris Hodge, as Administratrix of the Estate of James L. Hodge, deceased, Appellate, vs. Jacksonville Terminal Company, a corporation, Appellee, No. K-19, lately pending in the District Court of Appeal of Florida, First District, 222 So.2d 483, attached hereto marked Exhibit 1.

(b) Iris Hodge, as Administratrix of the Estate of James L. Hodge, deceased, Petitioner, vs. Jacksonville Terminal Company, a corporation, Respondent, No. 38810, lately pending in the Supreme Court of Florida, 234 So.2d 645, attached hereto marked Exhibit II.

(c) Order on Mandate entered in said Case No. K-19, lately pending in the said District Court of Appeal, entered by Chief Judge Dewey M. Johnson on the 3rd day of June, A.D., 1970, attached hereto marked Exhibit III.

2. The grounds on which the jurisdiction of the Supreme Court of the United States is invoked is that a State Court, the District Court of Appeal of Florida, First District, has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

(a) The date of the Judgment and Order sought to be reviewed is June 3, 1970, and the time of its entry is June 5, 1970, consisting of an ORDER ON MANDATE by which said District Court of Appeal adopted the Judgment and Opinion of the Supreme Court of Florida filed April 22, 1970, as the Opinion and Judgment of said District Court of Appeal thereby vacating and setting aside the prior Judgment and Opinion of said District Court of Appeal filed May 13, 1969.

(b) Petition for Rehearing of the Opinion and Judgment of the Supreme Court of Florida filed April 22, 1970, as aforesaid was denied by said Court on May 27, 1970, and the mandate of said Court issued and mailed to the Clerk of the District Court of Appeal of Florida, First District, on the same date, as will more fully appear from Exhibit IV attached hereto.

(c) The statutory provisions believed to confer on this Court jurisdiction to review the Judgment of said District

Court of Appeal of Florida, First District, by Writ of Certiorari is § 1257 of Title 28, U. S. Code, to-wit:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari * * * where any title, right, privilege, or immunity is specially set up or claimed under the * * * statutes of * * * the United States."

3. The questions presented for review are:

(a) Does the evidence sustain a Safety Appliance violation where the uncontradicted testimony of the Chief Mechanical Officer of the railroad, (who was called to the scene at the time of the accident and made a personal inspection and investigation of the brake equipment on each car before any of the equipment was moved), showed that the brake piston on each car had traveled the requisite distance, that the brake equipment was operating throughout the cut of cars, that the brake shoes were all in good condition and were applied to the wheels, and the manifest weight of all the evidence showed that train had been operated at not under 30 m.p.h. and only the train crew (who said they'd be fired if they testified otherwise) denied excessive speed, while seven non-crew employees all estimated the speed of the train at not under 30 m.p.h. and not over 35 m.p.h., none of whom called the stop "bad", while several referred to the stop as "efficient braking operation" or "good stop"?

(b) Where there is no evidence of defective brakes, only contrived conflict as to speed of train, is such a mere scintilla of evidence of "lawful speed" sufficient to present a jury question as to issue of efficient

braking power where speed and stopping distance alone is relied on to prove the inefficiency or insufficiency of brakes in stopping a moving train?

4. The statutes which the case involves are as follows:

(a) 45 U.S.C.A. § 9, as amended April 11, 1958, Public Law 85-375, 72 Stat. 86, which provides as follows:

> § 9. Power or train brakes; operation by engineer; rules for installation, inspection, maintenance, and repair.
>
> Whenever, as provided in sections 1-7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Secretary of Transportation may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid. One hundred and twenty days after the date of enactment of the Power or Train Brakes Safety Appliance Act of 1958, the Secretary of Transportation shall adopt and put into effect the rules, standards, and instructions of the Association of American Railroads, adopted in 1925 and revised in 1933, 1934, 1941, and 1953, with such revisions as may have been adopted prior to the enactment of such Act, for the installation, inspection, maintenance, and repair of all power or train brakes for common carriers engaged

in interstate commerce by railroad. Such rules, standards, and instructions shall thereafter remain the rules, standards, and instructions for the installation, inspection, maintenance, and repair of all power or train brakes unless changed, after hearing, by order of the Secretary of Transportation: *Provided, however*, That such rules or standards or instructions or changes therein shall be promulgated solely for the purpose of achieving safety. The provisions and requirements of this section shall apply to all trains, locomotives, tenders, cars, and similar vehicles used, hauled, or permitted to be used or hauled, by any railroad engaged in interstate commerce. In the execution of this section, the Secretary of Transportation may utilize the services of the Association of American Railroads, and may avail itself of the advice and assistance of any department, commission, or board of the United States Government, and of State governments, but no official or employee of the United States shall receive any additional compensation for such service except as now permitted by law. Failure to comply with any rule, regulation or requirement promulgated by the Secretary of Transportation pursuant to the provisions of this section shall be subject to the like penalty as failure to comply with any requirement of this section. As amended Apr. 11, 1958, Pub.L. 85-375, 72 Stat. 86.

(b) 45 U.S.C.A. § 51, commonly referred to as the Federal Employer's Liability Act:

§ 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging

in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

c. 45 U.S.C.A. § 53, enacted April 22, 1908, Chapter 149, § 3, 35 Stat. 66:

§ 53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any

of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, § 3, 35 Stat. 66.

5. STATEMENT OF THE FACTS:

James L. Hodge, deceased, lost his life when the automobile which he was operating was driven onto the crossing, despite the ringing bells and flashing red lights, and was struck by the lead car of a "cut" of cars being shoved over the crossing in a reverse movement.

Respondent, Plaintiff in the Court below, charged a violation of the provisions of 45 U.S.C.A. § 9 in that the train movement did not have the braking power specified by Federal law. (45 U.S.C.A. Sec. 9)

The case went to the jury on both a charge of negligence under the Federal Employer's Liability Act (45 U.S.C.A. 51) and the alleged violation of the Safety Appliance Act. (45 U.S.C.A. Sec. 9)

By a general verdict, the jury awarded damages totaling $195,200.00 but the trial court thereafter considered and granted Petitioner's Motion for a New Trial upon the ground

that there was *no evidence* upon which the jury could have properly found that the Defendant (Petitioner herein) violated the Safety Appliance Act (45 U.S.C., § 9) and the cause was accordingly improperly submitted to the jury for determination of such issue.

The said District Court of Appeals reversed that conclusion of the trial court but affirmed the granting of the new trial as a proper exercise of discretion and the Supreme Court of Florida granted certiorari. Upon consideration, the said Supreme Court of Florida affirmed the District Court of Appeal's ruling that the evidence was sufficient to sustain a Safety Appliance Act violation but reversed its affirmance of the new trial and remanded the cause for the reinstatement of the verdict by the trial court. This Petition followed.

It is conceded that there was *some*[1] conflict in the testimony *as to*: (1) the point at which the brakes were thrown into emergency application, and (2) the speed of the "cut" at the time of such application.[2]

But there is *no* evidence that the stop was not an "efficient stop"—*no* evidence that failure to stop sooner would have spared injury or death—and *no* evidence of defective brakes or braking power disclosed by a careful inspection of the

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1. The word "some" is intended to mean only a scintilla of evidence when weighed against that evidence which justifies "with reason" the conclusion that the brakes were in no way deficient or lacking in the "braking power specified by Federal Law.". Thus, the trial court's ruling: "* * * no evidence upon which the jury could lawfully have found that the Defendant violated the Safety Appliance Act * * *"

2. It was on the question of speed that counsel constructed his case so as to place Defendant on the horns of dilemma. The travel beyond point of impact being 257', if the train was traveling 30 to 35 m.p.h. Defendant was negligent; if 15 to 18 m.p.h., the brakes were inefficient. If the former, the FELA Count was proved. If the latter, Safety Appliance was proved. *It couldn't be both under the evidence.* Only the former comports with reason.

brakes on the spot at the time. On the contrary, the positive testimony from those witnesses who actually saw the "cut" of cars approaching the Church Street crossing and observed the application of the brakes was that the braking operation was "efficient" or "good".

The charge of a Safety Appliance violation was grounded on the assumption that the jury is entitled to ignore *positive testimony* of "an efficient stop", *positive findings* that the brakes were in good working order and *overwhelming evidence*[3] that the "cut" was going 30 to 35 m.p.h., and SUBSTITUTE THEREFOR the inference that the brakes lacked "braking power required" *solely by reason of the fact* that the train went 257 feet beyond the point of impact and the 3 crew members (whose testimony was "tongue in cheek" to say the least) claimed a speed of only 15 to 18 m.p.h.

These facts were clearly established:

(a) That the "cut", train movement (ACL 17), was being operated at a speed from 30 to 35 m.p.h. as it approached the Church Street crossing.

(b) That the "back-up man", Jenkins, was aware of the excessive speed of the movement, knew of the approaching crossing, knew of the likelihood that someone might be attempting to cross on foot, or by car, and was not keeping a careful lookout and did not see the automobile operated by Mr. Hodge as soon as he should have seen it and did

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3. This is not a hand-brake case and should be distinguished from *Myers v. Reading Co.*, 331 U.S. 477; 67 S.Ct. 1334 L.ed. 1615 where the court held mere "* * * failure to function, when operated with due care, in normal, natural and usual manner" is sufficient evidence to establish "inefficiency". Mr. Miller testified to 35 m.p.h.; Mr. Brickel testified to 30 m.p.h. and that it was an efficient braking operation; Mr. Burnsed 30 m.p.h.; Mr. McCabe 30 to 35 m.p.h.; Mr. Newman 35 m.p.h.; Mr. Collins 35 to 40 m.p.h.; Mr. McSwain 30 to 35 m.p.h.

nothing to retard the speed of the cut until it was too late.

(c) That Defendant knew, or should have known, that the Church Street crossing was a dangerous crossing because of its many tracks.

(d) That Mr. Hodge was killed while crossing in the face of ringing bells and flashing red lights.

(e) That *the train crew* in charge of the back-up movement, *obviously*, were underestimating the speed of the movement, and frankly acknowledged the motive therefore.

(f) That ACL 17 struck Mr. Hodge's automobile and pushed it 257 feet beyond the point of impact, between 3 and 4 car-lengths.

Despite all the negligence, and despite all the want of care, evidenced in the foregoing facts, it is impossible to find in those facts a violation of the Safety Appliance Act, not even by the use of the testimony of the three members of the train crew themselves, all of whom either testified or had their testimony stipulated by counsel, so that each uniformly estimated the speed of the train at between 15 and 18 m.p.h. as it approached the Church Street crossing.

Only the train crew, from the back-up man (Mr. Jenkins) to the engine crew (out of sight) nine cars away, furnished any testimony that the train was only going from 15 to 18 m.p.h. and their credibility was destroyed by their damaging admission (an admission against the Petitioner's interest), and by all the other evidence in the case.

Thus, the manifest weight and probative force of the evidence at the trial was such that the jury could not have lawfully (with reason) found a violation of the Safety Appliance Act, or that a violation contributed in whole or in part to the accident. Excessive speed under the circumstances was

all that reasonable men could have lawfully found on that evidence, a violation of 4 U.S.C.A. § 51 not 45 U.S.C.A. § 9 and damages should have been determined under 45 U.S.C.A. § 53, with appropriate diminution for the negligence of Plaintiff's decedent.

The effect of the Judgment and Order of the Supreme Court of Florida and the said District Court of Appeal in reversing the trial court was to apply the "scintilla" test which has been firmly rejected by this Court and other Federal Courts in all jury cases, including FELA cases.[4]

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4. In *Company of Carpenters, etc. v. Hayward*, K.B. 1780, 1 Dougl. 374, 99 Eng. Rep. 241, a nonsuit was denied with the observation: "Whether there by any evidence, is a question for the Judge. Whether sufficient evidence, is for the jury." This case has been considered as exemplary of the fact that British courts were originally applying a scintilla standard for determining when an issue was for the jury. Blume, Origin and Development of the Directed Verdict, 48 Mich. L.Rev. 555, 570 (1950). The same rule prevailed in early American decisions. See, e.g., *Greenleaf v. Birth*, 1835, 9 Pet. (34 U.S.) 292, 299, 9 L.Ed. 132 ("where there is no evidence tending to prove a particular fact, the courts are bound so to instruct the jury, when requested"); *Parks v. Ross*, 1850, 11 How. (52 U.S.) 362, 372-373, 13 L.Ed. 730 (peremptory instructions serve same purpose as demurrer to evidence and should be tested by same standard; a jury has no right to assume the truth of any material fact, without some evidence legally sufficient to establish it); *Richardson v. City of Boston*, 1856, 19 How. (60 U.S.) 263, 268-269, 15 L.Ed. 639:

> "If there be '*no evidence* whatever,' [citing *Parks*] to prove the averments of the declaration, it is the duty of the court to give such peremptory instruction. But if there be *some* evidence tending to support the averment, its value must be submitted to the jury with proper instructions from the court."

The phrases "any evidence" and "some evidence" were semantically interchangeable with what is generally referred to today as the "scintilla" rule. *See* IX Wigmore on Evidence, 3rd ed. § 2494, notes 11 and 12.

The English system, however, one year after *Richardson* was decided by the United States Supreme Court, abandoned the "scintilla" rule in *Toomey v. The London, etc., Ry. Co.*, C.P. 1857, 3 C.B. N.S. 145, 140 Eng.Rep. 694, with the observation:

> "A scintilla of evidence or a mere surmise that there might have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury. There must be evidence upon which they might reasonably and properly conclude that there was negligence."

Id. at 696 (emphasis added). According to Blume, *supra* at 564-565, *Toomey* and *Davis v. Hardy*, K.B. 1827, 6 B. & C. 225, 108 Eng.Rep.

6. Since this action was instituted under the said Federal Employer's Liability Act and the Safety Appliance Act, the "Federal question" was raised by virtue of the claim of a "right, privilege or immunity" under the statutes of the United States.

Thus, by amendment to the initial complaint, Count II was added, to-wit:

"9. Plaintiff realleges paragraphs 1, 2, 3, 6, 7 and 9 above as if they were repeated verbatim herein.

"10. At the above time and place, the defendant

436; 438 (new trial test), give us in brief the modern law of involuntary nonsuits."

The United States Supreme Court, in *Improvement Company v. Munson*, 1871; 14 Wall. (81 U.S.) 442, 20 L.Ed. 867, rejected the "scintilla" rule for the federal courts, holding:

"Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party.†

"† *Ryder v. Wombwell*, Law Reports, 4 Exchequer, 89; Law Reports, 2 Privy Council Appeals, 335.

Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.‡

"‡ *Jewell v. Parr*, 13 C.B. 916; *Toomey v. L. & B. Railway Co.*, 3 C.B., N.S. 150; *Wheelton v. Hardisty*, 8 Ellis & Blackburn, 266; *Schuchardt v. Allens*, 1 Wallace, 369 [17 L.Ed. 642]."

14 Wall. (81 U.S.) at 448. According to Mr. Justice Black, dissenting in *Galloway v. United States*, 1943, 319 U.S. 372, 404, 63 S.Ct. 1077, 1094, 87 L.Ed. 1458:

"The rule that a case must go to the jury unless there was 'no evidence' was completely repudiated in *Improvement Co. v. Munson*, 14 Wall. 442, 447 [20 L.Ed. 867] (1871), upon which the Court today relies in part. There the Court declared that 'some' evidence was not enough—there must be evidence sufficiently persuasive to the judge so that he thinks 'a jury can properly proceed.' The traditional rule was given an ugly name, 'the scintilla rule,' to hasten its demise."

[The foregoing footnote is reproduced here, verbatim, as it appeared in *Boeing Company v. Shipman*, 411 F.2d 365 at 383 (footnote 9)]

violated the provisions of 45 U.S.C.A., Section 9, in that the train movement did not have the braking power specified by said federal law.

"11. As a result of the failure of the defendant to obey 45 U.S.C.A., Section 9, the decedent, JAMES L. HODGE, was killed when the automobile which he was operating was struck by the lead car being shoved over the Church Street crossing in a reverse movement."

The trial court's Order, after the jury rendered a general verdict for the Plaintiff of $195,200.00 under *both* the FELA and Safety Appliance Act, provided, to-wit:

"*ORDER GRANTING MOTION FOR NEW TRIAL*

"This cause came on for hearing upon Motion for Judgment in Accordance with Motion for Directed Verdict and in the Alternative for a New Trial filed herein by Defendant, Jacksonville Terminal Company. Pursuant to the request contained in said motion the entire trial proceedings were transcribed prior to the hearing and made available to counsel for the respective parties and the Court. In reaching its decision the Court has carefully considered the same and the argument and law cited by both parties. Upon consideration thereof the Court has reached the conclusion that there was no evidence upon which the jury could lawfully have found that the Defendant violated the Safety Appliance Act (45 U.S.C., Sec. 9, et seq) as charged in Count II of the Amended Complaint and that the Court erred in submitting that issue to the jury for determination. Since Count II of the Amended Complaint afforded a completely different basis for recovery than Count I, it is the further opinion of this

Court that a new trial on the issues of negligence and damages must be granted.

"Accordingly, it is,

"ORDERED AND ADJUDGED:

"1. Defendant's Motion for New Trial should be and it, hereby, is granted on grounds 1, 2, 3, 4, and 22 of said Motion and the verdict and judgment rendered in the above entitled cause, including this Court's Order taxing costs filed herein September 18, 1967, are set aside. In all other respects said Motion is denied.

"2. Defendant's said Motion for Judgment is denied.

* * * *"

Upon appeal from said Order the District Court of Appeal of Florida, by its Judgment and Opinion, said, to-wit:

"Plaintiff's theory of liability under Count II was that the brakes on the train were inefficient on the occasion of this incident and that such inefficiency constituted a violation of the Safety Appliance Act.

"There was direct evidence of excessive speed. This is conceded by the defendant. The only evidence of inefficient brakes, however, was circumstantial and consisted of testimony given by members of the train crew on cross-examination that the train was traveling at the speed of 15-18 miles per hour. Further, there was testimony that at a speed of 15-18 miles per hour, the distance that it took to stop the train showed that the brakes did not operate efficiently. The latter conclusion being justified by the evidence introduced that the train did not come to a stop until it had reached some 257 feet from the point of impact. Witnesses testified that efficient brakes applied at the speed of

15-18 miles per hour would have stopped the train within 35 to 40 feet or 40 to 50 feet. These stopping distances were within the range of testimony as to the distance from the crossing that the brakes were applied.

"We think the evidence related above meets the standard of proof set by the federal courts in cases under the Safety Appliance Act. Those decisions govern the question of the sufficiency of the evidence and the type of proof necessary to make out a case under the appliance act. *Atlantic Coast Line Railroad Co. v. Barrett*, 101 So.2d 37 (Fla. 1958). In *Myers v. Reading Company*, 331 U.S. 477, 67 S. Ct. 1334, 91 L.Ed. 1615, the Supreme Court held that a violation of the subject act is established if the proofs show that the brakes did not operate efficiently on a single occasion and that such proof is not detracted from by other proof that they worked efficiently both before and after the occasion in question.

"Evidence that a train would have stopped in a certain distance at a given speed had the brakes been efficient has been held competent proof of the efficiency of brakes for the purpose of an action brought under the Safety Appliance Act. *Noe v. Chicago Western Railway Company*, 219 N.E. 2d 111 (Ill. App., 1965). It is evidence of this kind that the trial court erroneously held was insufficient to prove Count II in the instant case. We think the issue was correctly submitted to the jury on this evidence.

7. ARGUMENT:

When the said District Court of Appeal of Florida, and the Supreme Court of Florida, decided that the trial court erred in concluding that:

> "* * * there was no evidence upon which the jury could lawfully have found that the Defendant violated the Safety Appliance Act * * * as charged in Count II, and that the Court erred in submitting that issue to the jury for determination"

it decided a Federal question of substance in a way not in accord with applicable decisions of this court.

In reaching its conclusion, said District Court of Appeal cited as authority for its action three cases:

(a) *Atlantic Coast Line Railroad Co. v. Barrett*, 101 So.2d 37 (Fla. 1968) which was not a Safety Appliance action but an action for negligence under the FELA, 45 U.S.C.A. § 51; and, that opinion simply held that where the testimony showed a car inspector was inspecting a car by sticking his head therein at the time of a switching operation which was being conducted at a speed greater than that provided by the rules of the yard, that such evidence was sufficient to show the railroad guilty of negligence which resulted in the injury applying the test set forth by this court in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493, and the case of *Ringhiser v. Chesapeake & Ohio Railway Co.*, 354 U.S. 901, 77 S.Ct. 1093, 1 L.Ed.2d 1268.

(b) *Noe v. Chicago Great Western Railway Company*, 71 Ill. App. 2d 347, 219 NE2d 111 (1965), which was an action charging a violation of the Safety Appliance Act but that opinion was grounded solely on *Myers v. Reading Co.*, 331 U.S. 477, 67 S.Ct. 1334, 91 L.Ed. 1615 (1947). So, the *Noe*

case, supra, erroneously drew from the *Myers* case, supra, the conclusion that "evidence of an expert witness that if the brakes had been operating efficiently and properly, the train would have stopped short of the crossing" to be "proper evidence".

(c) And, *Myers v. Reading Co.*, supra, which said District Court of Appeal construed to hold "* * * that a violation of the subject act is established if the proofs show that the brakes did not operate efficiently on a single occasion and that such proof is not detracted from by other proof that they worked efficiently both before and after the occasion in question."

The substance of Petitioner's contention (that said decision decided a Federal question of substance in a way not in accord with applicable decisions of this Court) is this: in no case has this Court held or implied that a violation of the Safety Appliance Act is, or may be, established *where the proofs justify "with reason" only the conclusion that a train ran 257 feet before coming to a stop because the manifest weight of the evidence showed it was traveling at an excessive speed*, as distinguished from traveling at a lawful speed with inefficient or defective brakes.

Even a cursory review of the evidence in the case at bar will convince "reasonable men" that speed, not defective brakes, accounts for the 257 feet the train traveled from the point of impact until it came to a stop, particularly in light of the testimony that efficient brakes applied at the speed of 15 to 18 m.p.h. would have stopped the train within 30 to 40 feet or 40 to 50 feet.

To vacate the determination of the trial Court that there was "no evidence" upon which the jury could have "lawfully" found a violation of the Safety Appliance Act, under the evi-

dence in this case, is to permit a State Court to re-establish the "scintilla" rule so uniformly and firmly rejected by the Federal judiciary. (See footnote 4 on page 11).

Furthermore, the case principally relied upon, *Myers v. Reading Co.*, supra, involved an obviously defective hand brake; the defect of which was open and visible, and about which there was direct and positive testimony of malfunctioning when the injured employee tried to operate it. Thus the language, to-wit:

> "There are two recognized methods of showing the inefficiency of *hand brake equipment*. Evidence may be adduced to establish some particular defect, or the same inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural and usual manner." (Emp. Supp.)

The foregoing was quoted with approval from *Didinger v. Pennsylvania R. Co.* (CCA 6) 39 F.2d 798, 799, to announce the rule with respect to "hand brake equipment" and thereafter this court held, in *Myers*, supra,

> "It was, however, simple and direct testimony from which a jury reasonably might infer the brake's defectiveness and its inefficiency in the sense necessary to establish a violation of the Safety Appliance Acts."

Thereafter, this Court went on to say, to-wit:

> "The respondent is not subject, as has been suggested, to an absolute liability to its employees comparable to that established by a Workmen's Compensation law. As an interstate common carrier, however, it is subject to liability for injuries to its employees resulting from its violation of its absolute duty to comply with the Safety Appliance Acts. The evidence

here was sufficient to support the verdict for the Petitioner, whether tested by the formula used by this court in *Schuylkill & D Improv. & R. Co. v. Munson*, 14 Wall (US) 442, 20 L.Ed. 867; *Slocum v. New York L. Ins. Co.* 228 US 364, 57 L.Ed. 879, 33 S.Ct. 523, Ann Cas 1914D 1029; *Tennant v. Peoria & P.U.R. Co.* 321 US 29, 88 L.Ed. 520, 64 S.Ct. 409, 15 NCCA NS 647; or *Lavender v. Kurn*, 327 US 645, 90 L.Ed. 916, 66 S.Ct. 740, supra. *The requirement is for probative facts capable of supporting, with reason, the conclusion expressed in the verdict.*" (Emp. Supp.)

Reason does not support the conclusion that a 9 car train going 30 to 35 m.p.h. at the point of impact had defective brakes *solely* because it traveled 257 feet before stopping, where the undisputed evidence was that it made a "good" stop and inspection revealed no defect in braking system or any malfunction thereof.

CONCLUSION

The Appellate Courts of the State of Florida have misinterpreted and misapplied the rule laid down in *Rogers v. Missouri Pacific Railroad Co.*, supra, and *Myers v. Reading Co.*, supra, so as to impose legal responsibilities on railroad employers that the Congress of the United States never intended.

The Judgment and Opinion of the District Court of Appeal of Florida, as affirmed by the Supreme Court of Florida, re-establishes the "scintilla" rule in its review of the sufficiency of the evidence, substituting its view for the view of the trial judge.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

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PROOF OF SERVICE

I, WILLIAM H. MANESS, one of the attorneys for Jacksonville Terminal Company, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of August, A.D., 1970, I served two copies of the foregoing Petition for Certiorari on R. J. Beckham, Esquire, of Beckham and McAliley, Attorneys for Respondent, by mailing said copies in a duly addressed envelope, with air mail postage prepaid.

.....

Attorney

EXHIBIT I

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1969.

IRIS HODGE, as Administratrix
of the Estate of James L.
Hodge, deceased,

Appellant,

v.

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Appellee.

CASE NO. K-19

(222 So. 2nd 483)

Opinion Filed May 13, 1969.

An Appeal from the Circuit Court for Duval County.
Marion W. Gooding, Judge.

Beckham & McAliley and Horton & Schwartz, for Appellant.

Adams & Adams and William H. Maness, for Appellee.

SPECTOR, J.

By this appeal we are called upon to review an order granting the defendant a new trial after a jury verdict of $195,200 in a two-count action brought by appellant under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, and under the Safety Appliance Act, 45 U.S.C.A., Section 9.

The verdict was rendered for damages to appellant individually as surviving widow and to the minor children on account of the death of their father, an employee of the defendant terminal company.

Appellant's decedent, James L. Hodge, died as a result of injuries sustained in a collision between his car and a "cut of seven cars and three diesel engines" being operated by a crew of the appellee terminal company at the Church Street grade crossing in Jacksonville, Florida. After changing into his work clothes at the terminal company's locker room on the west side of the tracks, the decedent was driving his car easterly on Church Street to begin his job on the east side of the crossing. As he was crossing the tracks, his car was hit by the section of railroad cars and diesels which were being backed in a northerly direction on the appellee's tracks. Testimony as to the speed at which the train was traveling varied from an estimate of 15-18 miles per hour to 30-35 miles per hour. After the decedent's car was struck by the train, it was pushed a distance of 257 feet down the track.

The second amended complaint was in two counts. Count I alleged negligence on the part of appellee by failing to provide a safe place to work and by negligent operation of the train. Count II alleged violation of the Safety Appliance Act, supra, in that the train's air brake system failed to operate adequately and efficiently. In this appeal we are only concerned with matters arising out of the count based on the Safety Appliance Act since the order granting the defendant a new trial was based on the lower court's conclusion that ". . . there was no evidence upon which the jury could lawfully have found that the defendant violated the Safety Appliance Act (45 U.S.C., Sec. 9, et seq) as charged in Count II of the Amended Complaint and that the Court erred in sub-

mitting that issue to the jury for determination." The new trial order was also based on additional grounds which we will later discuss herein. The trial court's ruling that Count II should not have gone to the jury was tantamount to judgment notwithstanding the verdict as to Count II. After holding that there was no evidence to support Count II, the trial court stated:

> "Since Count II of the amended complaint afforded a completely different basis for recovery than Count I, it is the further opinion of this Court that a new trial on the issues of negligence and damages must be granted."

After so stating in the new trial order, the trial court proceeded to grant defendant's motion on grounds 1, 2, 3, 4, and 22 of defendant's motion for new trial. An examination of defendant's motion for new trial reflects numerous grounds advanced, but for the purposes of our consideration of this appeal we need discuss only two of the grounds forming the basis of the trial court's order, viz:

> "1. That the verdict herein is contrary to the evidence.
>
> * * *
>
> "4. That there is no evidence upon which the jury could have properly found that defendant violated the Safety Appliance Act (45 U.S.C., Section 9) and this cause was accordingly improperly submitted to the jury for determination thereof."

Appellant's brief is directed largely at ground No. 4 relating to the issue of evidence to support a jury instruction on the Safety Appliance Act violation alleged in Count II of the complaint. By its order, the trial court found there was no evidence to support that count and ordered a new trial on the issue of negligence embodied in the first count. We are

of the view, and so hold, that the lower court erred in holding there was no evidence to support the claimed violation of the Safety Appliance Act.

Plaintiff-Appellant's theory of liability under Count I was based on a number of alleged acts of negligence including the furnishing of a dangerous and unsafe place to work, failure to provide a barrier for vehicular traffic such as a lowered gate in circumstances where flashing lights and ringing bells were alleged to be insufficient protective devices, as well as other acts of negligence. Additionally, it was alleged that the defendant was negligent in that the cut of cars which struck the decedent was operated in a reverse movement at a speed that was excessive under the circumstances.

Plaintiff's theory of liability under Count II was that the brakes on the train were inefficient on the occasion of this incident and that such inefficiency constituted a violation of the Safety Appliance Act.

There was direct evidence of excessive speed. This is conceded by the defendant. The only evidence of inefficient brakes, however, was circumstantial and consisted of testimony given by members of the train crew on cross examination that the train was traveling at the speed of 15-18 miles per hour. Further, there was testimony that at a speed of 15-18 miles per hour, the distance that it took to stop the train showed that the brakes did not operate efficiently. The latter conclusion being justified by the evidence introduced that the train did not come to a stop until it had reached some 257 feet from the point of impact. Witnesses testified that efficient brakes applied at the speed of 15-18 miles per hour would have stopped the train within 35 to 40 feet or 40 to 50 feet. These stopping distances were within the range of testimony as to the distance from the crossing that the brakes were applied.

We think the evidence related above meets the standard of proof set by the federal courts in cases under the Safety Appliance Act. Those decisions govern the question of the sufficiency of the evidence and the type of proof necessary to make out a case under the appliance act. Atlantic Coast Line Co. v. Barrett, 101 So. 2d 37 (Fla. 1958). In Myers v. Reading Company, 331 U.S. 477, 67 S. Ct. 1334, 91 L. Ed. 1615, the Supreme Court held that a violation of the subject act is established if the proofs show that the brakes did not operate efficiently on a single occasion and that such proof is not detracted from by other proof that they worked efficiently both before and after the occasion in question.

Evidence that a train would have stopped in a certain distance at a given speed had the brakes been efficient has been held competent proof of the efficiency of brakes for the purpose of an action brought under the Safety Appliance Act. Noe v. Chicago Great Western Railway Company, 219 N.E. 2d 111 (Ill. App., 1965). It is evidence of this kind that the trial court erroneously held was insufficient to prove Count II in the instant case. We think the issue was correctly submitted to the jury on this evidence.

The order under review was based on grounds for a new trial other than the one that is discussed above. The trial court also held that the verdict of the jury was contrary to the evidence and in so holding came within the principles laid out in Cloud v. Fallis, 110 So. 2d 669 (Fla. 1959). There the court held that the trial judge has broad discretion in granting a new trial if he finds that the jury was influenced by consideration outside the record as he appears to have in the case at bar. Farrior v. Prudence Mutual Casualty Company, 220 So. 2d 386 (Fla. App. 1969).

Accordingly, we reverse the order granting a new trial

insofar as the same holds that there was no evidence placed before the jury to justify an instruction on the claimed violation of the Safety Appliance Act and affirm the order granting a new trial on the other ground stated in the order to the effect that the verdict is contrary to the evidence on the authority of Cloud v. Fallis, supra. See Hendricks v. Dailey, 208 So. 2d 101 (Fla. 1968).

Affirmed in part and reversed in part.

RAWLS, Acting Chief Judge; and JOHNSON, J., CONCUR.

EXHIBIT II

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1970

IRIS HODGE, as Administratrix
of the Estate of James L.
Hodge, deceased,

Petitioner,

v.

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Respondent.

CASE NO: 38,810
(234 So. 2nd 645)

Opinion filed April 22, 1970

Writ of Certiorari to the District Court of Appeal, First District

Horton & Schwartz and Beckham & McAliley, for Petitioner

Adam G. Adams, II, William H. Maness and Adams & Adams, for Respondent

DREW, J.:

In its decision[1] the District Court of Appeal reversed the order of the trial court "insofar as the same holds that there was no evidence placed before the jury to justify an instruction on the claimed violation of the Safety Appliance Act"

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1. Hodge v. Jacksonville Terminal Company, 222 So.2d 483 (1st Dist. Ct. App. Fla. 1969).

but "affirmed the order granting a new trial on the other ground stated in the order to the effect that the verdict is contrary to the evidence on the authority of Cloud v. Fallis, supra.". Petitioners here assert that the sole question presented to and argued on the appeal of the order granting a new trial to the District Court of Appeal was "*whether the evidence created a jury question as to the railroads violation of the Safety Appliance Act so that the jury was properly instructed on that issue*," and, therefore, that such decision is in direct conflict with Nunberg v. Brodsky,[2] holding in part:

> "The second ground of the order, that the verdict was not 'consistent' with the evidence, was insufficient upon which to grant a new trial. The trial court did not find or conclude that the verdicts were against the manifest weight of the evidence, for which, had he so concluded, a new trial properly could have been granted, as held in Cloud v. Fallis, Fla. 1959, 110 So.2d 669, 673. See also Florida East Coast R. Co. v. Haves, 66 Fla. 589, 64 So. 274, 276; Burnett v. Soule, 78 Fla. 507, 83 So. 461, 462; Greiper v. Coburn, 139 Fla. 293, 190 So. 902, 904; Hart v. Held, 149 Fla. 33, 5 So.2d 878, 882; Grand Assembly, etc. v. New Amsterdam Casualty Co., Fla. App. 1958, 102 So.2d 842, 846. Those cases reiterate the rule that where the evidence on the issues made is in conflict, and the verdict found thereon is not manifestly against the weight of the evidence, the court will not interfere and set aside the verdict of the jury."

The district court's conclusion that the trial judge did not err in granting a new trial "if he finds that the jury was influenced by consideration outside the record as he *appears* to have in the case at bar" is obviously erroneous because the

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2. 224 So.2d 727, 729 (3rd Dist. Ct. App. Fla. 1969).

trial judge made no such finding in the order. On the contrary, the order specifically stated:

> "... the Court has reached the conclusion that there was no evidence upon which the jury could lawfully have found that the defendant violated the Safety Appliance Act (45 U.S.C., Sec. 9 et seq) as charged in Count II of the Amended Complaint and that the Court erred in submitting that issue to the jury for determination ..."

The order then adjudged:[3]

> "1. Defendant's Motion for New Trial should be and

---

3. The grounds = 1, 2, 3, 4 and 22 of the Motion for New Trial were:

> "1. That the verdict herein is contrary to the evidence.
>
> "2. That the verdict herein is contrary to law.
>
> "3. That the verdict herein is contrary to the law and to the evidence.
>
> "4. That there is no evidence upon which the jury could have properly found that defendant violated the Safety Appliance Act (45 U.S.C., Section 9) and this cause was accordingly improperly submitted to the jury for determination thereof.
>
> * * *
>
> "22. By the giving of the last paragraph of plaintiff's requested instruction No. 9, with the fourth paragraph of plaintiff's requested instruction No. 1, and the giving of defendant's requested instruction No. 2 *in part only*, the Court erroneously TOLD the jury that plaintiff charges:
>
> '... that such movement did not have the *breaking power* specified by Federal law ... the burden of proof is upon the plaintiff to prove ... that the defendant violated the provisions of the Act as charged ...' and that the Federal law makes '... the defendant employer responsible in damages ... if the braking system ... was not *effectively working* ... and if said *inefficiency* in whole or in part produced the death of the employee.'; and then again, 'As to the statute concerning *efficient* train brakes ... the plaintiff is entitled to recover full damages if this allegation is proved ... regardless of the employee's actions.'
>
> "thus permitting the jury to award full damages if they found that the train brakes were 'not effectively working or were inefficient, contrary to the requirements of law.'"

it, hereby, is granted on grounds 1, 2, 3, 4 and 22 of said Motion and the verdict and judgment rendered in the above entitled cause, including this Court's Order taxing costs filed herein September 18, 1967, are set aside. In all other respects said Motion is denied."

We construe the order of the trial judge referring to ground no. 1 in the Motion for New Trial to have reference solely to facts concerning the submission to the jury of the Safety Appliance Act aspect of the case which was his principal concern – and obviously the concern of the parties on appeal to the district court. Setting aside a jury verdict on this ground requires more than a cursory disposition of a ground of a Motion for New Trial that "the verdict is contrary to the evidence." There should be an independent determination by the trial judge that "the jury was influenced by considerations outside the record." We find no determination in this record to support the district court's conclusion in this respect. On the contrary, ground 13 of the Motion for New Trial specifically charged that "the jury was motivated by passion, prejudice, bias or some other improper motive and or that the passions of the jury were inflamed by circumstances outside of the evidence in the case . . ." This paragraph was denied in the order of the trial judge.

The reliance by the district court on our decision in *Cloud v. Fallis*[4] to support its decision affirming the order granting the new trial because the verdict was "contrary to the evidence" is misplaced. The motion for new trial did not allege and the trial judge did not find that the verdict was against

4. 110 So.2d 669 (Fla. 1959).

"the manifest weight of the evidence" which is the rule announced in *Cloud v. Fallis, supra.*[5]

That portion of the decision of the district court which affirms the order granting a new trial is hereby quashed and the cause is remanded to the district court with directions to remand to the trial court with instructions to enter an appropriate judgment on the jury verdict.

It is so ordered.

ERVIN, C.J., THORNAL, CARLTON, ADKINS and BOYD, JJ., concur

ROBERTS, J., dissents

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5. "In an attempt to dispell this confusion about procedure of such importance, we will undertake to restate the law on the subject.

"When a motion for new trial is made it is directed to the sound, broad discretion of the trial judge. Poindexter v. Seaboard Air Line R. Co., Fla., 56 So.2d 905, Mead v. Bentley, Fla., 61 So.2d 428, who because of his contact with the trial and his observation of the behavior of those upon whose testimony the finding of fact must be based is better positioned than any other one person fully to comprehend the processes by which the ultimate decision of the triers of fact, the jurors, is reached. Pyms v. Meranda, Fla., 98 So.2d 341. "When the judge, who must be presumed to have drawn on his talents, his knowledge and his experience to keep the search for the truth in a proper channel, concludes that the verdict is against the manifest weight of the evidence, it is his duty to grant a new trial, and he should always do that if the jury has been deceived as to the force and credibility of the evidence or has been influenced by considerations outside the record. Martin v. Stone, supra [Fla., 51 So.2d 33], Turner v. Frey, supra [Fla., 81 So.2d 721, 722], Myers v. Atlantic Coast Line Railroad Co., Fla., 86 So.2d 792; Florida Publishing Co. v. Copeland, Fla., 89 So.2d 18.

"Inasmuch as such motions are granted in the exercise of a sound, broad discretion the ruling should not be disturbed in the absence of a clear showing that it has been abused. Dent v. Margaret Ann Super Markets, Fla., 52 So.2d 130; Geffrey v. Langstom Const. Co., Fla., 58 So.2d 698; Pyms v. Meranda, supra." Cloud v. Fallis, 110 So.2d 669, 673 (Fla. 1969).

See also Bennett v. Jacksonville Expressway Authority, 131 So.2d 740 (Fla. 1961); Numberg v. Brodsky, supra; Hendricks v. Dailey, 208 So.2d 101 (Fla. 1968).

EXHIBIT III

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA
JANUARY TERM, A. D. 1970

IRIS HODGE, as Administratrix
of the Estate of James L.
Hodge, deceased,

Appellant,

vs.

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Appellee.

CASE NO K-19

ORDER ON MANDATE

WHEREAS, the Judgment and decision of this Court in the above case was filed May 13, 1969 and reported in 222 So.2d 483, wherein the Judgment of the Circuit Court for Duval County was affirmed in part and reversed in part, and remanded with certain directions.

WHEREAS, this decision and judgment was reviewed by the Supreme Court of Florida by certiorari proceedings and this Court's judgment and decision was quashed.

WHEREAS, the Mandate of the Supreme Court of Florida has been filed with this Court, therefore,

IT IS ORDERED that the Judgment and Opinion of the Court filed May 13, 1969 be set aside, and held for naught

and the Opinion and Judgment of the Supreme Court filed April 22, 1970 be adopted as this Court's Opinion and Judgment and same shall accompany the Mandate of this Court to the Circuit Court of Duval County.

WITNESS the Honorable Dewey M. Johnson, Chief Judge, and Seal of the Court this 3rd day of June, A. D. 1970.

s RAYMOND E. RHODES
Clerk

A True Copy

ATTEST:

(SEAL)

/s/ RAYMOND E. RHODES
Clerk First District Court of Appeal
Tallahassee, Florida

EXHIBIT IV

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A. D. 1970
WEDNESDAY, MAY 27, A. D. 1970

IRIS HODGE, as Administratrix
of the Estate of James L.
Hodge, deceased,

Petitioner,

-vs-

JACKSONVILLE TERMINAL COMPANY,
a corporation,

Respondent.

CASE NO. 38,810

On consideration of the Petition for Rehearing filed by Attorneys for Respondent,

IT IS ORDERED BY the Court that the said petition be, and the same is hereby, denied.

A TRUE COPY,

TEST:

/s/ SID J. WHITE
CLERK SUPREME COURT

(SEAL)

(THE MANDATE IN THIS CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT)

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
SEP 22 1970
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 571

JACKSONVILLE TERMINAL COMPANY,
a Corporation,
Petitioner,

vs.

IRIS HODGE, As Administratrix of the Estate of
James L. Hodge, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 571

JACKSONVILLE TERMINAL COMPANY,
a Corporation,
Petitioner,

vs.

IRIS HODGE, As Administratrix of the Estate of
James L. Hodge, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The petitioner, Jacksonville Terminal Company, seeks review by petition for writ of certiorari, pursuant to 28 U.S.C., § 1257, of the decision of the First District Court of Appeal of Florida in *Hodge* v. *Jacksonville Terminal Co.*, Fla.App.1969, 222 So.2d 483, and that of the Supreme Court of Florida, reversing the Court of Appeal decision in part, in *Hodge* v. *Jacksonville Terminal Co.*, Fla.1970, 234 So.2d 645.

These decisions arose out of a wrongful death action brought in the Duval County, Florida Circuit Court by the administratrix of the estate of James L. Hodge, an employee of the defendant Jacksonville Terminal Co., who was killed when his car was struck at a crossing by the defendant's train in Jacksonville, Florida, on September 30, 1962. The action was brought under the Federal Employer's Liability Act, 45 U.S.C., § 51, et seq. and the "train brake" provision of the Safety Appliance Act, 45 U.S.C., § 9. In the state court trial, the trial judge instructed the jury on the issues of both the railroad's FELA negligence and its "absolute" liability under the Safety Appliance Act. The jury returned a general verdict for the plaintiff in the amount of $195,200. Thereafter the railroad filed motions for judgment in its favor notwithstanding the verdict and for a new trial, based upon numerous grounds. The trial judge denied the motion for judgment but granted the motion for new trial on the *single* ground that he had improperly instructed the jury on the Safety Appliance Act issue since, his order stated, "there is no evidence upon which the jury could have properly found that defendant violated [it]: . . ."

Under Florida practice, an order granting a new trial, although obviously not final, may be appealed to the relevant District Court of Appeal. In such an appeal, however, the sole grounds which may be considered by the appellate court are those assigned by the trial judge in granting the new trial. The party, here the defendant-railroad, in whose favor the new trial has been granted, may not cross-assign error, cross-appeal or otherwise argue in *that proceeding* that it was entitled to a judgment or that there should have been a new trial upon grounds not assigned by the trial judge. E.g., *Johnson v. City of Pensacola*, Fla.App.1964, 164 So.2d 844. Any such contentions by the prevailing party on the motion for new trial must await a final judgment against it, either after the new trial has taken place or

the order granting the new trial upon the grounds stated has been reversed. E.g., *Braddock* v. *Seaboard Air Line R. Co.*, Fla.1955, 80 So.2d 662, 668; *Seaboard Air Line R. Co.* v. *Braddock*, Fla.1957, 96 So.2d 127.

In this case, the First District Court of Appeal, on the plaintiff's appeal held, in the portion of its opinion now challenged by the railroad in this Court—that the trial judge had been incorrect in ruling that there was insufficient evidence to justify an instruction concerning the Safety Appliance Act. The legal and evidentiary basis of this holding was stated in the First District opinion as follows, at 227 So.2d 436:

> "There was direct evidence of excessive speed. This is conceded by the defendant. The only evidence of inefficient brakes, however, was circumstantial and consisted of testimony given by members of the train crew on cross examination that the train was traveling at the speed of 15-18 miles per hour. Further, there was testimony that at a speed of 15-18 miles per hour, the distance that it took to stop the train showed that the brakes did not operate efficiently. The latter conclusion being justified by the evidence introduced that the train did not come to a stop until it had reached some 257 feet from [illegible] point of impact. Witnesses testified that efficient brakes applied at the speed of 15-18 miles per hour would have stopped the train within 25 to 40 feet [illegible] feet. These stopping distances were within the range of testimony as to the distance from the crossing that the brakes were applied.
>
> "We think the evidence related above meets the standard of proof set by the federal courts in cases under the Safety Appliance Act. Those decisions govern the question of the sufficiency of the evidence and the type of proof necessary to make out a case under the appliance act. Atlantic Coast Line Railroad Co. v. Barrett, 101 So.2d 37, (Fla.1958). In Myers v. Reading Company, 331 U.S. 477, 67 S.Ct. 1334, 91 L.Ed.

1615, the Supreme Court held that a violation of the subject act is established if the proofs show that the brakes did not operate efficiently on a single occasion and that such proof is not detracted from by other proof that they worked efficiently both before and after the occasion in question.

"Evidence that a train would have stopped in a certain distance at a given speed had the brakes been efficient has been held competent proof of the efficiency of brakes for the purpose of an action brought under the Safety Appliance Act. Nue v. Chicago Great Western Railway Company, 71 Ill.App.2d 347, 219 N.E.2d 111 (1965). It is evidence of this kind that the trial court erroneously held was insufficient to prove Count II in the instant case. We think the issue was correctly submitted to the jury on this evidence."

The District Court, however, went on to hold that the new trial was properly granted upon another basis. 222 So.2d, at 486. This determination was in turn challenged—again by the plaintiff—by a petition for certiorari to the Supreme Court of Florida contending, again under Florida practice, that the District Court decision was in "direct conflict" with prior Florida cases. The Supreme Court agreed, assumed jurisdiction, and in the decision reported at 234 So.2d 645, quashed only that portion of the District Court decision requiring a new trial. It ordered a remand for the entry of a judgment on the jury verdict for the plaintiff. As, under Florida law, it unquestionably has the right to do, the defendant-railroad *has taken an appeal from the judgment entered pursuant to the mandate.* This appeal, challenging various other rulings in the trial court, is now pending in the First District Court of Appeal.

ARGUMENT

The respondent, Mrs. Hodge, contends that the petition should not be granted because (a) the Court lacks jurisdiction since the decisions sought to be reviewed are not "final" as required by 28 U.S.C., § 1257, and (b) on the merits, the Safety Appliance Act holding below does not justify certiorari review.

(a) No jurisdiction.

Since, as we have seen, the judgment which has now been entered pursuant to the decisions sought to be reviewed, is itself now the subject of a proper appeal by the present petitioner, it is obvious that the decisions below do not "terminate the litigation between the parties on the merits of the case", *Georgia Ry. & Power Co. v. Town of Decatur*, 262 U.S. 432, and do not complete and dispose of all elements of the controversy, e.g., *Gospel Army v. Los Angeles*, 331 U.S. 543; *Cotton v. Hawaii*, 211 U.S. 162. Thus, neither decision is a "final" one as is required to confer jurisdiction upon this Court under 28 U.S.C., § 1257. Any attempted review must await a final determination of the petitioner's present appeal in the Florida state courts. See *Seaboard Air Line R. Co. v. Braddock*, supra, cert. den., 355 U.S. 892.

(b) No basis for discretionary review.

On the merits, it is apparent that the District Court's decision, which has been quoted, and which did no more than pass upon the sufficiency of the evidence in a single and unique factual situation, was perfectly correct and entirely in accord with the decisions of this Court.

The petitioner bases its claim as to the "insufficiency" of the evidence of improper brakes upon the contention that the speed estimates *of its own train crew members*

could not as a matter of law have been believed. There is no question, as the District Court said, that if this evidence *were* believed there was sufficient additional testimony showing that the stopping distance required with that speed necessarily implied inadequate brakes. So far from being unjustified or in conflict with prior decisions of this Court, this contention—that evidence must be disregarded as "unbelievable"—flies directly in the face of every FELA and Safety Appliance Act decision of this Court. These cases have stressed, with uncommon emphasis, that questions of credibility and weight of evidence are for the jury and only the jury to determine, and that a court *may not* weigh such evidence in passing upon the question of its sufficiency. E.g.: *Wilkerson* v. *McCarthy*, 336 U.S. 53, *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500.

As the District Court also noted, its determination that this circumstantial evidence of improper braking was sufficient to create a Safety Appliance Act issue, was in full accord with the determinations of this Court in *Myers* v. *Reading Co.*, 331 U.S. 477, to the effect that a braking "inefficiency may be established by showing a failure to function, when operated with due care, in the normal, natural and usual manner", 331 U.S., at 483. See also *Noe* v. *Chicago Great Western R. Co.*, 71 Ill.App.2d 347, 219 N.E.2d 111.

REASONS FOR DENYING PETITION

The petition for writ of certiorari should not be granted because:

(1) The Court lacks jurisdiction under 28 U.S.C., § 1257;

(2) On the merits, the decisions below did not decide a question of substance or of broad applicability; they de-

termined only the sufficiency of the evidence in a particular factual setting; and

(3) The federal question concerning the sufficiency of the evidence was decided in accordance with the prior determinations of this Court in analogous, if not identical, situations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief was mailed to Petitioner herein by placing same in the United States mail, properly addressed, postage prepaid, on this the 21st day of September, 1970, to the attorneys named below:

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